A

CHUA YUNG KIM v. MADLIS AZID & ORS

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
B [CIVIL APPEAL NO: S-02-395-02-2012]
9 NOVEMBER 2017

NATIVE LAW & CUSTOM: *Land dispute – Sale of land – Whether there was misrepresentation and inequality of bargaining power – Villagers approached businessman for financial assistance in paying surveyor fees – Businessman appointed third parties to prepare and execute power of attorneys, sale and purchase agreements and memorandums of transfer in his favour – Whether illiterate villagers had benefit of professional legal advice – Failure to call material witness who purportedly attested to villagers' signing or thumb-printing of documents to effect transfer and sale of their beneficial interest in lands to businessman – Whether adverse inference invoked – Evidence Act 1950, s. 114(g) – Whether registration of lands to businessman defective – Whether registration of memorandum of transfer lawful and valid – Whether transfer of ownership ought to be set aside*

CIVIL LAW ACT: *English law – Applicability – Common law – Doctrine of inequality of bargaining power – Whether applied in State of Sabah – Villagers approached businessman for financial assistance in paying surveyor fees – Whether certain agreements and power of attorneys executed in businessman's favour – Factors raising inference of inequality of bargaining power – Whether application of doctrine of inequality of bargaining power necessary – Civil Law Act 1956, s. 3(1)*

LIMITATION: *Accrual of cause of action – Whether action filed out of time – Whether claim fell under item 97 of Schedule to Sabah Limitation Ordinance – Whether limitation period six years from time right to sue accrues – Whether claim statute-barred*

In 1979, the respondents, natives of Sabah from a remote village called Kampung Keniogan, each applied for the alienation of individual lots of land in the Sungai Sugut area for agricultural purposes. The lands were approved in 1983, to be alienated as native lands. The lands were required to be collectively surveyed by a surveyor before they could be alienated and individual titles issued to each of the respondents. However, the respondents did not have money to pay for the survey fee. The first respondent, on behalf of all the respondents, approached the appellant for financial assistance. It was then agreed that the appellant would advance the survey fee on behalf of the respondents and that upon issuance of the title deeds of the lands, the respondents would then negotiate with the appellant for a possible sale of the lands to the appellant. The appellant told the first respondent that to enable him to liaise with the relevant authorities on matters relating to the survey

of the lands, certain agreements and power of attorneys would have to be executed in his favour by the respondents. The appellant subsequently visited the respondents at Kampung Keniogan and brought with him copies of various documents for each of the respondents to execute. Not all but only some of the respondents executed the documents, which comprised the power of attorneys, sale and purchase agreements and memorandum of transfer for each land and for each respondent. They were in fact documents to effect transfer and sale of their beneficial interest in lands to the appellant. The appellant, however, submitted that at the meeting with the first respondent, the latter had expressed his desire to give the lands to him for free as he was not sure whether the lands were still available. The appellant instead offered to buy them for RM100 per lot and that he would take all the risks and check whether the lands were still available and then pay for the survey fee. The appellant said it was the first respondent who got the power of attorneys, the sale and purchase agreements and the memorandums of transfer prepared and signed or thumb-printed before they were handed over to him. Thus, the appellant's version was that it was a straightforward sale by the respondents of their lands to him for the purchase price of RM100 per lot. When the present action was filed, many of the respondents who applied for the lands had passed away. The action was taken by their respective administrators who had been issued with the Jadual 3 to the Administration of Native and Small Estates Ordinance and s. 74 of the Sabah Land Ordinance ('the Land Ordinance'). The respondents in the High Court pleaded a case of misrepresentation, forgery, *non est factum* and inequality of bargaining power and claimed for, *inter alia*, the transfers of ownership and related transactions of the respective approved lands from each or any one of the respondents to the appellant ought to be set aside. The High Court Judge allowed the respondents' claim and held the view that even if the respondents had knowingly and willingly executed the various legal documents, the circumstances of the case would attract the common law doctrine of inequality. Hence, the present appeal. The issues that arose were (i) whether there was mishandling of the facts or the law by the trial judge to warrant appellate intervention; (ii) whether the English common law doctrine of inequality of bargaining power applied in the State of Sabah; (iii) whether the trial judge was entitled to draw adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 for not calling a material witness; and (iv) whether the respondents' causes of action against the appellant were statute barred by virtue of the Sabah Limitation Ordinance ('the Limitation Ordinance').

Held (dismissing appeal with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The trial judge had explained in great detail why he found the first respondent's version of events to be credible and why he disbelieved the appellant's version of events. As for the appellant's claim that it was the

A first respondent who arranged for the preparation and execution of the documents *ie*, the power of attorneys, the sale and purchase agreements and the memorandums of transfer, the judge's firm finding of fact was that the documents were prepared by third parties on the instruction of the appellant. The evidence in fact showed that the appellant had
B instructed the law firm of Messrs Tan Pang Tsen & Co, the same law firm that represented him in the High Court and in this appeal, to prepare the legal documents for him. The respondents on their part did not have the benefit of professional legal advice. Thus, there was no mishandling of the facts or the law by the trial judge to warrant appellate
C intervention. (paras 23-25)

(2) In the absence of any written law in force in Malaysia on inequality of bargaining power after the coming into force of the Civil Law Act 1956 ('CLA 1956') in Sabah on 1 April 1972, there was no reason why the common law doctrine of inequality of bargaining power should not be
D adopted as the common law of Sabah. The factual matrix of the present case fit in perfectly well with the doctrine. The proviso to s. 3(1) of the CLA 1956 provides that the said common law of England shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as
E local circumstances render necessary. The common law doctrine of inequality of bargaining power met those requirements in so far as the State of Sabah was concerned. The application of the doctrine in Sabah was necessary if justice were to prevail as it will prevent unscrupulous and unconscientious parties from taking unfair advantage of their superior bargaining power over the inhabitants of Sabah in their hour of
F need, such as had happened in the present case. (paras 47-49)

(3) With regard to the issue of forgery, some of the respondents testified in unequivocal terms that they never thumb-printed the documents that the appellant brought over to Kampung Keniogan for them to execute, yet
G the appellant without any reasonable explanation, chose not to call the person who purportedly attested to the documents to give evidence. The evidence was that this person was an unnamed second-class Magistrate of the District of Paitan. The judge was therefore entitled to draw adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 for not calling the mysterious second-class Magistrate as a
H witness. The adverse inference would be that this person was either not a Magistrate or if he was a Magistrate, he never attested to the signing or thumb-printing of the documents by the aforesaid respondents. Further, the appellant's act of signing each of the land titles as holder of the power of attorneys was in breach of s. 97(1) of the Land
I Ordinance as his signature on the power of attorneys was not attested by a person duly qualified under that provision. (paras 56-58)

(4) Each of the title deeds has an express term that the transfer or sublease of the title is prohibited unless the written consent of the Director of Lands and Survey was first obtained. There was no such consent by the Director in the present case. The purported Registrar of native lands had apparently signed a blank memorial with no particulars on each of the land titles. Despite the defects, the appellant had somehow managed to register the purported approval by the Director of the amendment to the terms of all 98 pieces of land and to register the transfer of all 98 titles into his name in one day. Clearly, something was seriously wrong with the registration of the lands into the appellant's name. It was therefore not surprising that the judge found the registration of the memorandums of transfer to be 'plainly unlawful and invalid'. (paras 60 & 61)

(5) The respondents' claim did not fall under items 93 and 94 of the Schedule to the Limitation Ordinance. The item that applied was the omnibus item 97, which provides that the limitation period is six years from the time the right to sue accrues. Thus, the earliest date for the respondents to sue would be when the appellant signed as owner of the lands on 22 August 2006 or the registration of the appellant's interest as owner on 15 September 2006. The six-year period which commenced from that date would only expire on 22 August 2012 or 15 September 2012. The respondents' action was therefore filed within time. (paras 63 & 64)

Bahasa Malaysia *Headnotes*

Pada 1979, responden-responden, anak negeri Sabah dari sebuah kampung yang dikenali sebagai Kampung Keniogan, masing-masing memohon pengasingan lot tanah individu di kawasan Sungai Sugut untuk tujuan pertanian. Tanan-tanah itu diberi kelulusan pada 1983, untuk diasingkan sebagai tanah-tanah anak negeri. Tanah-tanah itu perlu secara kolektif dikaji oleh juruukur sebelum diasingkan dan hak milik individu dikeluarkan kepada setiap responden. Tetapi responden-responden tidak mempunyai wang untuk membayar yuran survei. Responden pertama, bagi pihak responden-responden yang lain, meminta bantuan kewangan daripada perayu. Dipersetujui kemudiannya bahawa perayu akan mendahulukan yuran survei bagi pihak responden-responden dan apabila surat hak milik tanah dikeluarkan, responden-responden akan berunding dengan perayu untuk kemungkinan jualan tanah-tanah kepada perayu. Perayu memberitahu responden pertama bahawa untuk membolehkannya berurusan dengan pihak-pihak yang berkenaan berhubungan survei tanah-tanah itu, persetujuan-persetujuan dan surat kuasa wakil perlu ditandatangani memihak kepadanya oleh responden-responden. Perayu kemudiannya melawat responden-responden di Kampung Keniogan dan membawa bersama-sama dengannya salinan beberapa dokumen untuk ditandatangani oleh setiap responden.

A Beberapa responden, tidak semua, menandatangani dokumen-dokumen tersebut, termasuk surat kuasa wakil, perjanjian jual beli dan memorandum pindah milik untuk setiap tanah dan untuk setiap responden. Dokumen-dokumen itu sebenarnya membawa kesan pemindahan dan penjualan kepentingan benefisial mereka dalam tanah-tanah kepada perayu. Perayu,
B walau bagaimanapun, menghujahkan bahawa semasa mesyuarat dengan responden pertama, responden pertama menyatakan hasratnya untuk memberikan tanah-tanah itu kepada perayu secara percuma kerana dia tidak pasti sama ada tanah-tanah itu masih sedia ada. Perayu sebaliknya memberi tawaran untuk membeli tanah-tanah itu daripada responden-responden
C dengan harga RM100 setiap lot dan dia akan mengambil segala risiko dan memeriksa sama ada tanah-tanah itu masih sedia ada dan membayar yuran survei. Perayu menyatakan bahawa responden pertama yang telah mendapatkan surat kuasa wakil, perjanjian jual beli dan memorandum pindah milik dan memperoleh tandatangan dan cap ibu jari sebelum menyerahkannya kepada perayu. Oleh itu, versi perayu adalah ini sememangnya penjualan
D jelas dan mudah tanah-tanah oleh responden-responden kepada perayu untuk harga belian berjumlah RM100 setiap lot. Apabila tindakan guaman ini difailkan, kebanyakan responden telah meninggal dunia. Tindakan guaman ini dimulakan oleh pentadbir masing-masing yang telah diberikan Jadual 3 kepada Administration of Native and Small Estates Ordinance dan s. 74
E Ordinan Tanah Sabah ('Ordinan Tanah'). Responden-responden di Mahkamah Tinggi memplidkan kes misrepresentasi, pemalsuan, *non est factum* dan ketidaksamaan kuasa tawar-menawar dan menuntut, antara lain, pemindahan pemilikan dan transaksi-transaksi berkaitan tanah-tanah yang diluluskan daripada setiap responden atau salah seorang responden-responden kepada
F perayu diketepikan. Hakim Mahkamah Tinggi membenarkan tuntutan responden-responden dan berpegang pada dapatan bahawa jika responden telah secara sedar dan rela hati menandatangani pelbagai dokumen undang-undang itu, keadaan kes akan membangkitkan doktrin common law iaitu ketidaksamaan kuasa tawar- menawar. Oleh itu, rayuan ini. Isu-isu yang
G timbul adalah (i) sama ada hakim bicara telah salah mengendalikan fakta-fakta atau undang-undang, mewajarkan campur tangan rayuan; (ii) sama ada doktrin common law Inggeris bagi ketidaksamaan kuasa tawar-menawar terpakai di Negeri Sabah; (iii) sama ada hakim bicara berhak membuat tanggapan bertentangan terhadap perayu bawah s. 114(g) Akta Keterangan 1950 kerana gagal memanggil saksi penting; dan (iv) sama ada kausa tindakan
H responden-responden terhadap perayu dihalang oleh statut melalui Ordinan Had Masa Sabah ('Ordinan Had Masa').

I

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah menjelaskan secara terperinci berkenaan mengapa beliau mendapati versi responden pertama boleh dipercayai dan mengapa beliau tidak mempercayai versi perayu. Bagi tuntutan perayu bahawa responden pertama telah mengaturkan penyediaan dan pelaksanaan dokumen-dokumen iaitu surat kuasa wakil, perjanjian jual beli dan memorandum pindah milik, dapatan fakta hakim adalah bahawa dokumen-dokumen disediakan oleh pihak ketiga atas arahan perayu. Keterangan fakta menunjukkan perayu telah mengarahkan firma undang-undang Tetuan Tan Pang Tsen & Co, firma undang-undang yang sama yang mewakili perayu di Mahkamah Tinggi dan dalam rayuan ini, untuk menyediakan dokumen undang-undang untuknya. Responden-responden tidak mempunyai manfaat nasihat undang-undang profesional. Oleh itu, tiada salah kendalian fakta atau undang-undang oleh hakim bicara bagi mewajarkan campur tangan rayuan.

(2) Tanpa apa-apa undang-undang bertulis di Malaysia tentang ketidaksamaan kuasa tawar-menawar selepas penguatkuasaan Akta Undang-Undang Sivil 1956 ('AUS 1956') di Sabah pada 1 April 1972, tiada alasan mengapa doktrin common law ketidaksamaan kuasa tawar-menawar tidak boleh dipakai sebagai common law di Sabah. Fakta matriks kes sangat sesuai untuk pemakaian doktrin. Peruntukan s. 3(1) AUS 1956 memperuntukkan bahawa common law tersebut boleh diguna pakai selagi hal keadaan dan negeri-negeri di Malaysia dan penduduk-penduduknya masing-masing membenarkan dan tertakluk pada kelayakan-kelayakan yang hal keadaan tempatan fikirkan perlu. Doktrin common law bagi ketidaksamaan kuasa tawar-menawar memenuhi keperluan Negeri Sabah. Pemakaian doktrin di Sabah adalah perlu jika keadilan mengatasi segalanya kerana ini menghalang pihak yang tidak bertanggungjawab daripada mengambil kesempatan kuasa perundingan mereka yang lebih tinggi atas penduduk-penduduk Sabah, seperti yang berlaku dalam kes ini.

(3) Berkenaan isu pemalsuan, beberapa responden memberi keterangan dalam terma-terma yang jelas bahawa mereka tidak menggunakan cap ibu jari atas dokumen-dokumen yang dibawa oleh perayu kepada Kampung Keniogan untuk dilaksanakan, tetapi perayu tanpa penjelasan munasabah, memilih untuk tidak memanggil orang yang kononnya telah mengikrarkan dokumen-dokumen untuk memberikan keterangan. Keterangan menunjukkan bahawa orang ini adalah Majistret kelas kedua Daerah Paitan yang tidak dinamakan. Hakim berhak membuat anggapan bertentangan terhadap perayu bawah s. 114(g) Akta Keterangan 1950 kerana tidak memanggil Majistret kelas kedua ini sebagai saksi. Tanggapan bertentangan adalah bahawa orang ini bukan seorang Majistret atau jika pun dia adalah seorang Majistret, dia tidak

A mengikrarkan tandatangan atau pencetakan ibu jari dalam dokumen-dokumen oleh responden-responden. Tambahan lagi, tindakan perayu menandatangani setiap hak milik tanah sebagai pemegang surat kuasa wakil melanggar s. 97(1) Ordinan Tanah kerana tandatangannya atas surat kuasa wakil tidak diikrarkan oleh orang yang berkelayakan bawah
B peruntukan itu.

(4) Setiap surat hak milik mempunyai terma jelas bahawa pindah milik atau sewaan hak milik adalah dilarang melainkan jika kebenaran bertulis Pengarah Tanah dan Survei diperolehi terlebih dahulu. Tiada persetujuan sedemikian oleh Pengarah dalam kes ini. Pendaftar tanah
C anak negeri telah menandatangani sebuah memorial kosong tanpa butiran berkenaan setiap surat hak milik. Walaupun terdapat kecacatan, perayu telah berjaya mendaftarkan kelulusan Pengarah berkenaan pindaan terma ke semua 98 bidang tanah dan mendaftarkan pindah milik ke semua 98 hak milik bawah namanya dalam satu hari. Jelas ada
D sesuatu yang tidak kena dengan pendaftaran tanah-tanah kepada nama perayu. Tidak mengejutkan bahawa hakim mendapati pendaftaran memorandum pindah milik adalah 'salah dari segi undang-undang dan tidak sah'.

(5) Tuntutan responden-responden tidak tergolong bawah item 93 dan 94
E Jadual kepada Ordinan Had Masa. Item yang terpakai adalah item 97, yang memperuntukkan bahawa tempoh had masa adalah enam tahun dari masa hak mengambil tindakan terakru. Oleh itu, tarikh paling awal untuk responden-responden mengambil tindakan adalah apabila perayu menandatangani sebagai pemilik tanah-tanah pada 22 Ogos 2006 atau
F pendaftaran kepentingan perayu sebagai pemilik pada 15 September 2006. Tempoh enam tahun yang bermula dari tarikh itu hanya akan tamat tempoh pada 22 Ogos 2012 atau 15 September 2012. Tindakan responden-responden dengan itu difailkan dalam tempoh masa.

Case(s) referred to:

G *Affin Bank Bhd v. Mohd Kassim Ibrahim [2013] 1 CLJ 465 FC* ***(refd)***
American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA ***(refd)***
Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk Hj Nuar & Ors [2011] 8 CLJ 749 FC ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
H *Commercial Bank of Australia Ltd v. Amadio and Another (1983) 46 ALR 402* ***(refd)***
Fry v. Lane, re Fry, Whittet v. Bush (1889) 40 Ch D 312 ***(refd)***
Lim Geok Hian v. Lim Guan Chin [1994] 1 SLR 203 HC ***(refd)***
Lloyds Bank Ltd v. Bundy [1975] QB 326 ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
I *Natwest Bank Plc v. Morgan [1985] 1 AC 686* ***(refd)***
Powell and Wife v. Streatham Manor Nursing Home [1935] AC 243 ***(refd)***
Saad Marwi v Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***
Superintendant of Lands and Surveys, 4th Division & Anor v. Hamit B Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Legislation referred to:
Administration of Native and Small Estates Ordinance (Sabah) (Cap 1), Schedule 3
Civil Law Act 1956, s. 3(1)(b)
Contracts Act 1950, s. 16(2)
Evidence Act 1950, s. 114(g)
Interpretation (Definition of Native) Ordinance (Sabah) (Cap 64), s. 3(3)
Land Ordinance (Sabah) (Cap 68), s. 74

For the appellant - Edwin Tsen; M/s Tan Pang Tsen & Co
For the respondents - Roland Cheng & Nadia Chung; M/s Roland Cheng & Co

[Editor's note: For the High Court judgment, please see Madlis Azid & Ors v. Chua Yung Kim & Ors [2013] 2 CLJ 110 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] One of the issues raised in this appeal was whether the English common law doctrine of inequality of bargaining power applies in the State of Sabah. The appellant contended that it does not and that the applicable law is our written law on undue influence as provided by s. 16 of the Contracts Act 1950 ("the Contracts Act").

[2] For the facts of the case, we shall rely on those that the learned trial judge had set out in his grounds of judgment, with the necessary modifications. They are as follows. All 98 respondents (plaintiffs at the trial) are natives of Sabah from a remote village on an island off the east coast of Sabah called Kampung Keniogan. The first respondent, Madlis bin Azid @ Aziz is the Ketua Kampung of the village. He was only educated up to primary six. The 97 other respondents are all related to him either by blood or by marriage. They were by and large fishermen or housewives and were illiterate. Only a handful of them could read and write in Bahasa Malaysia.

[3] In 1979, the respondents each applied for alienation of individual lots of land measuring about 15 acres in the Sungai Sugut area for agricultural purposes. The lands were approved in 1983, to be alienated as native lands and the respondents were given 395.62 hectares in total ("the lands"), which worked up to approximately 4.037 hectares (about ten acres) each.

[4] The lands were required to be collectively surveyed by a licenced surveyor before they could be alienated and individual titles issued to each of the respondents. But the respondents did not have money to pay for the survey fee of RM147,950 even after the final extension was given by the Lands and Survey Department to pay the fee within six months, failing which their land application approvals would be cancelled.

[5] The first respondent on behalf of all the respondents then urgently approached the appellant, Chua Yung Kim a.k.a. "Angti" for financial assistance. The appellant was a businessman who owned a petrol station at Beluran with whom the first respondent had past business dealings.

[6] The first respondent asked the appellant whether he could help with the survey fee that he and the other respondents so badly needed. The appellant said he could help. They then discussed the terms on which the appellant could assist the respondents to pay for the survey fee.

[7] After the discussions, it was agreed that the appellant would advance the survey fee on behalf of the respondents. It was also agreed that upon issuance of the title deeds of the lands, the respondents would then negotiate with the appellant for a possible sale of the lands to the appellant.

[8] The appellant told the first respondent that to enable him to liaise with the relevant authorities on matters relating to the survey of the lands, certain agreements and power of attorneys would have to be executed in his favour by the respondents.

[9] About a week later, the appellant visited the respondents at Kampung Keniogan and brought with him copies of various documents for each of the respondents to execute. Not all but only some of the respondents executed the documents, which comprised the power of attorneys, sale and purchase agreements and memorandums of transfer for each land and for each respondent. They were in fact documents to effect transfer and sale of their beneficial interest in lands to the appellant.

[10] Not all the respondents knew the appellant, and only some could remember receiving RM100 (one hundred ringgit only) from the appellant at Kampung Keniogan and signing documents for the purpose of the survey and issuance of titles to the lands. None of the respondents admitted that they sold their respective lots to the appellant for a paltry sum of RM100 per lot. Those who admitted receiving the RM100 said it was meant as "saguhati".

[11] The appellant's version was diametrically opposed to the first respondent's version. His story was that at the meeting with the first respondent, the first respondent expressed his desire to give the lands to him for free as he was not sure whether the lands were still available. However, the appellant said he would not take the lands for free and instead offered to buy them for RM100 per lot and that he would take all the risks and check whether the lands were still available and then pay for the survey fee, premium and other expenses.

[12] According to the appellant, he gave the first respondent a sample of the power of attorney, the sale and purchase agreement and the memorandum of transfer, with the instruction that if the first respondent was satisfied with them, the first respondent could arrange for the documents to be prepared and signed by him and the other respondents.

[13] The appellant said it was the first respondent who got the power of attorneys, the sale and purchase agreements and the memorandums of transfer prepared and signed or thumb-printed before they were handed over to him. In other words, the preparation of the documents and their execution by the respondents were all arranged by the first respondent. Thus, the appellant's version was that it was a straightforward sale by the respondents of their lands to him for the purchase price of RM100 per lot. As we mentioned, the size of each lot was about ten acres.

[14] When the present action was filed on 14 October 2009, many of the respondents who applied for the lands had passed away. The action was taken by their respective administrators who had been issued with the Jadual 3 to the Administration of Native and Small Estates Ordinance 1941 and s. 74 of the Sabah Land Ordinance ("the Land Ordinance").

[15] The agreed issues to be tried by the High Court were as follows:

(1) Whether the transfers of ownership and related transactions of the respective approved lands from each or any one of the first to 98th respondents to the appellant ought to be set aside on any or all or a combination of the following grounds, namely:

   (a) misrepresentation as pleaded by the first to 48th respondents;

   (b) forgery as pleaded by the 49th to 98th respondents;

   (c) *non est factum* as pleaded by any or all of the respondents;

   (d) inequality of bargaining power as pleaded in the statement of claim and in particular at paras. 1, 2, 8, 9, 10, 11, 18, 21, 22 and 25;

   (e) material irregularities or anomalies for individual approved lands as pleaded in para. 21(f) of the statement of claim; and/or

   (f) further or alternatively to the above grounds, the appellant, being a Chinese businessman, was not able to deal with or own native lands alienated to the native plaintiffs.

(2) Whether the first to 98th respondents' causes of action against the appellant were statute-barred under the Sabah Limitation Ordinance ("the Limitation Ordinance") in that the respondents ought to have commenced their action within three years either of receipt of the payment of the alleged purchase price or knowledge that the first respondent had collected the title deeds as respectively pleaded in paras. 11 and 14(b) of the amended defence of the appellant.

[16] Before us however, the native status of the appellant (ground 1(f)) was no longer in issue as the respondents accepted that the appellant is a holder of an anak negeri certificate and as such is recognised as a native of Sabah. The appellant had earlier written to the court for an adjournment of this appeal pending the determination of his status as a native of Sabah by the board of officers pursuant to s. 3(3) of the Interpretation (Definition of Native) Ordinance 1952.

[17] It was agreed between the parties that the evidence of PW1 to PW27 all of whom were the respective respondents, would be representative of the other respondents save for the first respondent, and that to save judicial time there was no need to call them individually.

[18] In resisting the respondents' claim, the appellant relied on the power of attorneys, the sale and purchase agreements, the memorandums of transfer executed by each of the respondents and the registration of interest in his name in the land registry based on such documents and dealings. The appellant is now holding on to the 98 land titles and defends his registration of interest as owner of the lands based on these documents and dealings.

[19] After a full trial of the action, the learned judge allowed the respondents' claim in terms of prayers (a)(i) to (iv) & (ix), (b)(i) and (c)(i) of the statement of claim, hence the present appeal by the appellant. Having heard arguments by both sides, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[20] We must point out at the outset that on all crucial issues of fact, there was a sharp conflict of evidence between the appellant and the respondents and the learned judge made it clear in his grounds of judgment that he preferred the evidence of the respondents. We reproduce below what the learned judge said at para. 15 of his judgment:

> 15. Having heard and considered the evidence and the conflicting versions of the events and witnesses of the Plaintiffs and the 1st Defendant, I prefer the evidence of the Plaintiffs over that of the 1st Defendant, as I find that the 1st Defendant's version of events is not credible. I noted that the Plaintiffs denied that they agreed to sell the Lands to the 1st Defendant. I find that it is most unlikely that any person who wanted to give away land for free, would for RM100 each piece of land take the trouble to prepare so many sets of documents and to get them executed, for the benefit and advantage of the other party, in a language which he does not understand at all and which none of the plaintiffs understand.

[21] Of particular significance to note is the learned judge's finding that the appellant was an "evasive and untruthful" witness. We have no basis to disagree with the learned judge's assessment of the appellant's credibility as a witness. Nor do we have any basis to say that his assessment of the

appellant's credibility was plainly wrong and that he had failed to take proper advantage of his having seen and heard the appellant giving evidence first hand and in real time.

[22] This appeal therefore involved, at its core, the issue of the credibility of the witnesses. The principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact, especially where the question involves the issue of the credibility of the witnesses are well settled. Suffice it if we refer to the oft-cited judgment of the House of Lords in *Powell and wife v. Streatham Manor Nursing Home* [1935] AC 243, 249 where Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing' For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there is a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.* per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says:
>
> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such

A circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put to himself, as I do now in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a B clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[23] From para. 16 onwards of his grounds of judgment, the learned trial C judge had explained in great detail why he found the first respondent's version of events to be credible and why he disbelieved the appellant's version of events. It is clear to us that there was no mishandling of the facts or the law by the learned judge to warrant appellate intervention.

[24] As for the appellant's claim that it was the first respondent who D arranged for the preparation and execution of the documents, ie, the power of attorneys, the sale and purchase agreements and the memorandums of transfer, the learned judge's firm finding of fact was that the documents were prepared by third parties on the instruction of the appellant.

[25] The evidence in fact shows that the appellant instructed the law firm E of Messrs Tan Pang Tsen & Co, the same law firm that represented him in the High Court and before us in this appeal, to prepare the legal documents for him. The respondents on their part did not have the benefit of professional legal advise.

F **[26]** Now we come to the crucial point of law. The learned judge's view was that even if the respondents had knowingly and willingly executed the various legal documents, ie, with eyes wide open, the circumstances of the case would attract the common law doctrine of inequality of bargaining power, citing the following passages in the judgment of this court in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98; [2001] 2 AMR 2010 G where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court said:

> Suffice that I refer to what I think is the leading case upon the subject. It is *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 1 All ER 144. In that case, Nourse LJ said (a p. 151): H
>
> > On that state of facts it must, I think, have been very well arguable that Miss Burch could, directly against the bank, have had the legal charge set aside as an unconscionable bargain. Equity's jurisdiction to relieve against such transactions, although rarely exercised in modern times, is at least as venerable as its jurisdiction to relieve I against those procured by undue influence. In *Fry v. Lane, re Fry, Whittet v. Bush* (1889) 40 Ch D 312 at 322; [188690] All ER Rep 1084

at 1089, where sales of reversionary interest at considerable undervalues by poor and ignorant persons were set aside, Kay J, having reviewed the earlier authorities, said:

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advise, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and a fortiori if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advise, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selbourne's words, that the purchase was "fair, just and reasonable.
>
> ...

The position in Australia is the same as that in England. It is exemplified by the decision of the High Court in C*ommercial Bank of Australia Ltd v. Amadio* (1983) 152 CLR 447. It is sufficient that I quote from two passages in the report. The first is in the judgment of Gibbs CJ at p. 459:

> In my opinion it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, even in the absence of fraud, misrepresentation or undue influence. Of course, the bank and the respondents did not meet on equal terms, but that circumstance alone does not call for the intervention of equity, as Lord Denning MR clearly illustrated in *Lloyds Bank v. Bundy* [1975] QB 326, 336. *A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken an unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed.*

(emphasis added)

[27] Learned counsel for the appellant however contended that the court in that case did not expound and apply the common law doctrine of inequality of bargaining power, but rather the more established doctrine of unconscionable bargain. With due respect to the learned counsel, although Gopal Sri Ram JCA spoke of unconscionable bargain, the unanimous decision must be understood in the context of the following pronouncement by the learned judge at pp. 114-115 (CLJ):

> In my judgment, the time has arrived when we should recognize the wider doctrine of inequality of bargaining power. And we have a fairly wide choice on the route that we may take in our attempt to crystallise the law upon the subject. The position is that after 1956, we are at liberty to fashion rules of common law and equity to suit our own needs and are not to treat ourselves as being bound hand and foot by English cases.

[28] It was contended that in any event *Saad Marwi* was wrongly decided as the court did not consider the fact that the Contracts Act does not provide for rescission of a contract on the ground of inequality of bargaining power. It was argued that the Contracts Act only provides for rescission of a contract where there was "undue influence" as stipulated by s. 16 which reads:

> Undue influence
>
> 16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another
>
> (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, or mental or bodily distress.
>
> (3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.
>
> (b) Nothing in this subsection shall affect section III of the Evidence Act 1950 [Act 56].

[29] According to learned counsel, what one has to establish to prove "undue influence" under s. 16 of the Contracts Act is unconscionable conduct and not inequality of bargaining power. The argument presupposes that the doctrine of inequality of bargaining power comes under the regime of undue influence, with respect to which there is already a written law in force in Malaysia, namely s. 16 of the Contracts Act. With due respect to learned counsel we do not think that is correct. While unconscionable conduct is a necessary component of the doctrine of inequality of bargaining power, inequality of bargaining power is not a component of undue influence.

[30] Therefore s. 16 of the Contracts Act, which deals with undue influence, is not such written law within the meaning of s. 3(1)(b) of the Civil Law Act 1956 ("the Civil Law Act") that has the effect of excluding the application of the common law doctrine of inequality of bargaining power in Sabah. We shall come back to this provision later in this judgment.

[31] Section 16 of the Contracts Act speaks of a relationship where one party is in a position to "dominate the will" of the other and uses that position to obtain unfair advantage over that other. It is not a section that deals with inequality of bargaining power between two contracting parties.

[32] There is a subtle but real difference between dominating a person's will and taking unfair advantage of one's superior bargaining power over that person. It was not the respondents' case that the appellant dominated their will. Their complaint was that the appellant had taken unfair advantage of his superior bargaining power over them.

[33] Perhaps we should reproduce again sub-s. 16(2) of the Contracts Act to illustrate the point:

> (2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another
>
> (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, or mental or bodily distress.

[34] Paragraph (a) speaks of authority over the other or standing in a fiduciary relation to the other. Paragraph (b) speaks of mental incapacity. Both have nothing to do with inequality of bargaining power. The common law doctrine of inequality of bargaining power is not only about domination of will by one person over another. Over and above that, the doctrine is concerned with unconscionable bargain, of taking unfair advantage of a person's superior bargaining power, or of the position of disadvantage in which the other party was placed: *Commercial Bank of Australia Ltd v. Amadio and Another* (1983) 46 ALR 402.

[35] It was urged upon us not to follow *Saad Marwi* but to follow the decision of another panel of this court in *American International Assurance Company Ltd v. Koh Yen Bee* [2002] 4 CLJ 49; [2002] 4 MLJ 301 where Abdul Hamid Mohamad JCA (as he then was) writing for the majority said at p. 67:

> Learned counsel for the respondent relied heavily on the provision of s. 3(1) of the Civil Law Act 1956 and the decision of this court in *Saad bin Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98. That case appears to be the first case in this country in which the court applied the doctrine of inequality of bargaining power independently of the well-established doctrine of undue influence. In *Datuk Joginder Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196 (FC) a case involving a solicitor and his client, where the word "unconscionable" was used in passing, the issue was considered under the head of "undue influence".

> We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provisions of s. 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, fraud, misrepresentation and mistake as a factor that affect free consent. Secondly, the restrictive wording of s. 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, that fact the court by introducing such principles is in effect "legislating" on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause.

[36] What needs to be pointed out first and foremost with regard to this case is that the majority did not decide that the common law doctrine of inequality of bargaining power does not apply in Malaysia. They merely had "some doubts" about it. Secondly, although the majority had "some doubts" about the doctrine, they acknowledged that the facts in *Saad Marwi* clearly support such a decision "if justice were to prevail".

[37] Thirdly and perhaps more importantly, under s. 3(1)(b) of the Civil Law Act, the common law of England and the rules of equity, together with statutes of general application as administered or in force in England on 1 December 1951 "shall" be applied by the court in the State of Sabah "save so far as other provision has been made or may hereafter be made" by any written law in force in Malaysia.

[38] To provide context, we reproduce in full below s. 3(1) of the Civil Law Act:

> **Application of U.K. common law, rules of equity and certain statutes**
>
> 3. (1) Save so far as other provision **has been made or may hereafter be made** by any written law in force in Malaysia, **the Court shall**:
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) **in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1951**;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (emphasis added)

[39] What the provision means in its application to Sabah is that if there is no written law in force in Malaysia on the common law doctrine of inequality of bargaining power or any other common law doctrine after the coming into force of the Civil Law Act in Sabah on 1 April 1972, the court "shall" apply such common law of England as administered or in force in England on 1 December 1951, subject to the proviso to the section.

[40] In dealing with this provision in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 Hashim Yeop Sani CJ (Malaya) delivering the judgment of the Supreme Court said at p. 66:

> Section 3 of the Civil Law Act, 1956 directs the Courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the Courts of this country. We cannot just accept the development of the common law in England.

[41] If today Parliament were to amend the Contracts Act by including the doctrine of inequality of bargaining power as part of Malaysian contract law, then the common law doctrine would still apply throughout Malaysia but in the form of a written law. In fact, the law on undue influence which learned counsel for the appellant referred to is a common law doctrine which has since been made our written law through s. 16 of the Contracts Act.

[42] It must be remembered that the common law doctrine of inequality of bargaining power had been administered or in force in England even before 1 December 1951, the cut-off date for the application of such common law in Sabah. This can be deduced from the case of *Fry v. Lane, re Fry, Whittet v. Bush* (1889) 40 Ch D 312; [1886-90] All ER 1084. The case citation indicates that it was decided in the late 1880's.

[43] Although the court in that case did not use the term "inequality of bargaining power", it is obvious that Kay J was speaking in terms of the doctrine. We do not agree with learned counsel for the appellant that the notion of "inequality of bargaining power" first arose from the English Court of Appeal case of *Lloyds Bank Ltd v. Bundy* [1975] QB 326 where Lord Denning MR used the term "inequality of bargaining power" but which the House of Lords ten years later in *Natwest Bank Plc v. Morgan* [1985] 1 AC 686 rejected outright by saying that if any such view had gained currency, "let it be destroyed now once and for all".

[44] It was on the strength of this indictment by the House of Lords that learned counsel for the appellant contended that the common law doctrine of inequality of bargaining power does not exist. But there has been no outright rejection of the doctrine in Malaysia. In the Federal Court case of

Affin Bank Bhd v. Mohd Kassim Ibrahim [2013] 1 CLJ 465, the majority did not touch on the doctrine of inequality of bargaining power but Zainun Ali FCJ in her dissenting judgment adopted the English and Australian positions when Her Ladyship said:

> [130] On the facts it is clear that the appellant and the respondent did not meet on equal terms, although that circumstance alone does not call for the court's intervention on equitable or other grounds and whilst this doctrine (of the inequality of bargaining power) may be a new jurisprudential approach in our jurisdiction, it has gained popular approval in both England and Australia.
>
> [131] In Australia (at least), the test to be applied as to whether equitable relief is applicable if unconscientious advantage is taken of a party who is at a special disadvantage in a contractual dealing (as happened in the instant appeal) is manifold. The first requirement is that there has to be existence of circumstances which amount to a special disadvantage; the second is that the court concerns itself with the conduct of the stronger party, rather than with the reality of the weaker party's consent. In other words, the conduct of the stronger party will be seen as being unconscionable if he knew or ought to have known of the special disadvantage and took advantage of it to further his interests. Thirdly, it relates to evidence of the value of the transaction; fourthly to lack of independent advise and lastly if it can be shown that the stronger party can clearly discern, at the time of the contract, that the weaker party is sufficiently weak, as to make it *prima facie* unfair for the stronger party to accept the contract.
>
> [132] The above situation was described neatly as a form of "contractual imbalance" by Lord Brightman in *Hart v. O'Connor* [1985] AC 1000.

[45] The position in Singapore can be seen from the High Court case of *Lim Geok Hian v. Lim Guan Chin* [1994] 1 SLR 203. There too the court did not reject the doctrine of inequality of bargaining power when it said:

> The concept of 'inequality of bargaining power' was insufficient in itself, in the absence of any unconscionable conduct, to justify the setting aside of a contract. Three principles in deciding whether an agreement was unconscionable and should be set aside are: (a) poverty (as in a member of a lower income group) and ignorance (as in less highly educated), (b) sale at an undervalue and (c) lack of independent advise.

[46] Presently there is, as far as we are aware, no written law in force in Malaysia on inequality of bargaining power after the coming into force of the Civil Law Act in Sabah on 1 April 1972, nor does Sabah have its own common law on such doctrine of law after that date. Therefore, the common law doctrine of inequality of bargaining power, being the common law that was administered or in force in England on 1 December 1951, is the law to be applied in Sabah, subject of course to the proviso to s. 3(1) of the Civil Law Act.

[47] In the absence of any written law in force in Malaysia on inequality of bargaining power after the coming into force of the Civil Law Act in Sabah on 1 April 1972, there is no reason why in our view the common law doctrine of inequality of bargaining power should not be adopted as the common law of Sabah. The factual matrix of the present case fits in perfectly well with the doctrine.

[48] The proviso to s. 3(1) of the Civil Law Act provides that the said common law of England shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. We do not see how it can be said that the common law doctrine of inequality of bargaining power does not meet those requirements insofar as the State of Sabah is concerned.

[49] On the contrary, we are inclined to think that the application of the doctrine in Sabah is necessary if justice were to prevail. It will prevent unscrupulous and unconscientious parties from taking unfair advantage of their superior bargaining power over the inhabitants of Sabah in their hour of need, such as had happened in the present case.

[50] The application of the common law doctrine in Sabah will, in our opinion, ensure that those with superior bargaining power will act conscientiously, fairly, justly and reasonably in their contractual dealings with those whom they know are in weak bargaining positions. Whether those having superior bargaining power have taken unfair advantage of their superior bargaining power to warrant intervention by equity must be determined based on the facts and circumstances of each case.

[51] We have mentioned earlier that the House of Lords in *Natwest Bank Plc* shot down Lord Denning's attempt to propagate the doctrine of inequality of bargaining power by destroying it "once and for all". The House of Lords had its own reasons for taking that stand, but in its application to the circumstances of the State of Sabah and its inhabitants, we think that the common law doctrine will serve justice rather than stultify it. It will promote fair play in the market place.

[52] In the present case, the reasons why the learned trial judge found the doctrine to be applicable to the facts and circumstances of the case can best be explained in his own words, which we reproduce below:

> (a) The plaintiffs are by and large fishermen or housewives who are illiterate. Only a handful of them read and write Bahasa Malaysia. The 1st Plaintiff as their ketua kampong and leader in the dealing with the 1st Defendant, was educated up to primary 6 only. The Plaintiffs were under financial pressure and time constraint to find the necessary funds to pay for survey of the Lands before the titles to the Lands could be issued to them.

A

(b) The 1st Defendant admitted in cross-examination that at the meeting in the year 2002, the 1st Plaintiff requested him to advance a sum of money to pay the survey fees for the Lands and that he, the 1st Defendant had agreed to advance the money. The 1st Defendant also admitted that he had informed the 1st Plaintiff that he would require the Plaintiffs to sign some agreements and power of attorney and that these documents were required to enable him to liaise with the relevant authorities. I find the nature of the agreements signed by the Plaintiffs in response to the 1st Defendant's said request is radically different from what was represented as the Plaintiff were asked to sign sale and purchase agreements for the said Lands when they did not intend to sell the Lands to the 1st Defendant, at that material time.

B

C

(c) The 1st Defendant testified that the price for each of the Plaintiffs' respective individual land measuring approximately 10 acres is RM100. I find that such value of the Lands was grossly undervalued, unrealistic and not capable of belief. I prefer the evidence of the Plaintiffs that the sum of RM100 was "saguhati" and were given as inducement to the Plaintiffs, to sign the various documents and not meant as the purchase price for the Lands.

D

(d) There was no independent advise offered to any of the Plaintiffs before the documents were given to some of them to sign or thumbprint. I find that various documents were not prepared by the Plaintiffs but by third parties under the directions of the 1st Defendant and furthermore the various documents were in the English language, I find that there was also no evidence that someone explained the true contents to those of the Plaintiffs who had signed the documents. I do not believe that the 1st Plaintiff and/or the other Plaintiffs would take the trouble to prepare the various documents if the purchase price for their individual lot of lands is only RM100.

E

F

(e) I find that the Statutory Declarations of nearly all the Plaintiffs, which were affirmed in the months of September and October 2006, and attested by Encik Rashid [DW2] who is a 2nd Class magistrate at Beluran, declaring that the 1st Defendant had purchased the Lands from each plaintiff for the price of RM100 which he had paid and that each of the respective plaintiffs had no claim against him, to be no evidential value as I find that there was no credible evidence that those Plaintiffs who signed the said Statutory Declaration knew what they were signing nor was there any credible evidence that the contents of the said Statutory Declarations were explained to the relevant Plaintiffs. Further I find the demeanour and testimony of DW2, unconvincing and not credible.

G

H

(f) I find that the evidence showed the survey fees were paid by one Ayub Khan through his company Pembinaan Klias Sdn Bhd and that the quit rent was paid by the 1st Plaintiff, from money borrowed from Ayub Khan, and not by the 1st Defendant.

I

[53] Learned counsel for the appellant raised the point that the learned judge should not have allowed the respondents to raise the defence of inequality of bargaining power as it was not pleaded in the first place. In response, learned counsel for the respondents pointed out that although it was not pleaded, it was an agreed issue to be tried as set out in para. 1(d) of the agreed issues. We agree with the respondents. The appellant cannot approbate and reprobate.

[54] It was further submitted by learned counsel for the respondents that they did not depart from their pleaded case of misrepresentation, forgery, *non est factum* and inequality of bargaining power and that the evidence at the trial was a necessary development of their pleaded case. Reference was made to the then Supreme Court case of *Superintendant of Lands and Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567, where it was held as follows:

> (2) the rule that if a party is taken by surprise by evidence which departs from pleaded material facts, he must object then and there at the point of time when such evidence emerges, in order for such evidence to be disregarded by the Court. It will be too late when it is objected to later on, as in final submission at the close of the evidence, as happened in the instant case.

[55] In the present case, no objection was taken by the appellant when evidence of inequality of bargaining power was introduced by the respondents at the trial. It is therefore too late for the appellant to raise the objection now.

[56] With regard to the issue of forgery, the 9th, 14th, 16th, 21st, 34th, 49th, 52nd, 61st and 62nd respondents testified in unequivocal terms that they never thumb-printed the documents that the appellant brought over to Kampung Keniogan for them to execute, yet the appellant without any reasonable explanation, chose not to call the person who purportedly attested the documents to give evidence. The evidence was that this person was an unnamed second class Magistrate of the District of Paitan.

[57] The learned judge was therefore entitled to draw adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 for not calling the mysterious second-class Magistrate as a witness. The adverse inference would be that this person is either not a Magistrate or if he is a Magistrate, he never attested to the signing or thumb-printing of the documents by the aforesaid respondents.

[58] The learned judge had further found the appellant's act of signing each of the land titles as holder of the power of attorneys to be in breach of s. 97(1) of the Land Ordinance as his signature on the power of attorneys was not attested by a person duly qualified under that provision. We reproduce below s. 97(1) for ease of reference:

A 97. (1) The signature of each party to every memorandum and title shall be attested by any officer specially appointed by the Minister or by one of the following persons:

(a) in Sabah:

a Magistrate, Justice of the Peace, Notary Public, Commissioner for
B Oaths, an Advocate or the Collector;

(b) in any place within Malaysia other than Sabah or in any place within the Commonwealth:

a Magistrate, Justice of the Peace, Notary Public or Commissioner
C for Oaths;

(c) in any other place:

a Malaysian Consular Officer;

Provided that in the case of a document executed under seal of a
D company incorporated or registered under the laws of Malaysia and bearing the signature of the secretary and at least one director of the company, attestation shall not be required.

[59] The person before whom the appellant purportedly signed the power of attorneys was one "Johny S Maling, Kerani Tanah, Beluran", ie, a land
E clerk and therefore not a qualified person under s. 97(1) of the Land Ordinance. It is interesting to note that the title deeds for all 98 pieces of land were registered in one day by this person on 22 August 2006.

[60] Each of the title deeds has an express term that the transfer or sublease of the title is prohibited unless the written consent of the Director of Lands
F and Survey was first obtained. There was no such consent by the Director in the present case. The purported Registrar of native lands had apparently signed a blank memorial with no particulars on each of the land titles.

[61] Despite the defects, the appellant somehow managed to register the purported approval by the director of the amendment to the terms of all 98
G pieces of land and to register the transfer of all 98 titles into his name in one day on 15 September 2006. Clearly something was seriously wrong with the registration of the lands into the appellant's name. It is therefore not surprising that the learned judge found the registration of the memorandums of transfer to be "plainly unlawful and invalid".

H **[62]** The appellant had also raised the issue of limitation. It was his contention that the respondents' causes of action against him were statute barred by virtue of the Sabah Limitation Ordinance ("the Limitation Ordinance") in that the respondents failed to commence their action within three years either after receipt of the payments of the alleged purchase price
I or knowledge that the appellant had collected the title deeds. The appellant's argument was that items 93 and 94 of the Schedule to the Limitation Ordinance should apply to bar the respondents from prosecuting the action.

[63] In rejecting the defence, the learned judge found that the respondents' claim did not fall under items 93 and 94 of the Schedule to the Limitation Ordinance. He opined, rightly in our view, that the item that applied is the omnibus item 97, which provides that the limitation period is six years from the time the right to sue accrues, citing *Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk OKK Hj Nuar & Ors* [2011] 1 LNS 833 and *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32.

[64] Thus, the earliest date for the respondents to sue would be when the appellant signed as owner of the lands on 22 August 2006 or the registration of the appellant's interest as owner on 15 September 2006. The six year period which commenced from that date would only expire on 22 August 2012 or 15 September 2012. The respondents' action was therefore filed within time.

[65] For all the reasons aforesaid, the appeal is dismissed with costs of RM20,000 to the respondents, subject to payment of the allocator fee. The deposit is refunded to the appellant.